80-1412

Office-Supreme Court, U.S.
FILED
FEB 17 1981
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

GEORGE R. IHLE, IDA M. IHLE,
his wife, and NEW SOUTH
ENTERPRISES, INC.,

Petitioners,

vs.

FLORIDA PUBLISHING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Albert S. C. Millar, Jr.
1239 King Street
Jacksonville, Florida 32204
(904) 388-5032
Attorney for Petitioners

PETITION

COMES NOW, your Petitioners and show unto this Honorable Court, as follows:

(a). There was no official or unofficial reported opinion delivered below except as appears in the Final Judgment of the trial court attached hereto.

(b) (i). The date of the decision sought to be reviewed is November 17, 1980.

(ii). There was no rehearing permitted and is no order granting an extension of time in which to file this Petition.

(iii). Jurisdiction of this court is invoked pursuant to 28 USCA 1257 (3).

(c). May a newspaper publish a libelous article about a restaurant under a fictitious name and be protected by the Freedom of Press Provision of the United States Constitution.

May a newspaper assert the defense of fair comment when it prevents the libelee from proving actual malice of the author by concealing the identity of the author.

Is a fictitious person entitled to the fair comment protection of the First Amendment?

(d) The constitutional question involved is the First Amendment to the United States Constitution as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(e). The Petititioners owned a small restaurant in which they had earned a living for a number of years. Undisclosed agents of the Respondent visited the Petitioners' restaurant and thereafter wrote a libelous article in Respondent's newspaper under the fictitious name "Jean Romain" in which he, she or they described Petitioners' food **inter alia** as being strange, cold, unpleasant, scrawny, stale, smaller than correct portions and generally a bad experience. The article further stated there was no wine and that a large part of the restaurant was closed for lack of business, both statements were absolutely untrue. Immediately upon publication of this article, the Petitioners' volume of business dropped in half and stayed there until the restaurant went out of business. Immediately after publication of the article, the Petitioner, George Ihle, telephoned

the Respondent to speak with the author of the article and was refused his or her name. The Petitioner hoped to counter this bad publicity by a beefed-up advertising and he felt it only fair that he be afforeded the name of the author of his article in order that he might point out possible bias or malice and discuss the author's culinary qualifications or lack of same. The Respondent refused to divulge the author's name.

Finally, in desperation Petitioner invited his veiled critic back to his restaurant and enclosed a gift certificate for the published cost of "Jean Romain's" check in order that he or she might reconsider their original article. The gift certificate was returned but "Jean Romain" never returned.

(f). The question of priviledged communication as fair comment under the First Amendment absent actual malice was first raised by the Respondent in its Motion to Dismiss as follows:

"It affirmatively appears the publication was a previledged comment on a matter of public interest." And in its Motion for Summary Judgment as follows:

"Now comes the Defendant and moves the Court for entry of Summary Judgment for Defendant based on the record, depositions, and attached affidavits, on the basis that there is no conflict as to any material fact and Summary Judgment is required to be entered as a matter of law, on the following grounds:

1. It is an established principle of law as enunciated in **Gertz v. Welch,** 418 U. S. 323 at pages 339 and 340:

"Under the First Amendment **there is no such thing as a false idea.** However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries but on the competition of other ideas." "

The Circuit Court granted the Respondent's Motion for Summary Judgment.

The federal question was raised in the District Court of Appeal, First District in Appellant's Brief as follows:

"1. Can a publication enjoy a qualified priviledge if it is published in an improper manner?

2. Is it improper for a newspaper to publish a derogatory article about another under a fictitious name?"

Florida Rules of Appellate Procedure no longer permit

Assignments of error. Rule 9.040 (e) "Assignments of Error. Assignments of Error are neither required nor permitted." The District Court of Appeal, First District affirmed **per curiam.**

The federal question was raised in the Florida Supreme Court as follows:

"NOTICE IS HEREBY GIVEN that George R. Ihle, invokes the certiorari jurisdiction of the Supreme Court to review the decision of this Court rendered October 15, 1980.

This decision conflicts with another decision of the Supreme Court of Florida and the Supreme Court of the United States."

The Florida Supreme Court denied **certiorari.**

(h). Petitioners assert that Respondent should not be able to shield itself from liability in a libel action by virtue of the First Amendment when the article in question was published under a fictitious name, contrary to the law. To be entitled to First Amendment protection an article should be published in a proper manner. This Article was published contrary to Florida Statute, Section 836.03, **infra.** Publication under a fictitious name contrary to the statutes of the State of Florida raises an inference of malice.

Petitioners submit that a fictitious person is not entitled to the fair comment protection of the First Amendment.

Petitioners submit that it is impossible to show actual malice under the teaching of **New York Times Company v. Sullivan,** 376 US 254, II L ed 686, 84 S Ct 710, when the author remains anonymous. Phrased differently, the Respondent should be estopped from asserting the defense of fair comment when it prevents the libelee from showing actual malice of the author.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 79-6065-CA

DIVISION "E"

GEORGE R. IHLE, IDA M. IHLE, his wife, and NEW SOUTH ENTERPRISES, INC.,

Plaintiffs,

vs.

FLORIDA PUBLISHING COMPANY,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT AND SUMMARY JUDGMENT

This cause came on to be heard after due notice on Defendant's Motion for Summary Judgment in this libel suit, supported by the pleadings, the depositions of the Plaintiffs, and various affidavits.

1. Plaintiffs sue because the Defendant newspaper on April 26, 1976, ran an article or review of Plaintiffs' restaurant entitled "It Wasn't a Fancy Meal."

2. The article had some favorable comments, but the most unfavorable comments were:

> "Our food was served. My steak, listed as 10 ounces seemed small. It appeared to have been cooked in a blast furnace, which may have accounted for its scrawny look.
>
> "My spouse found the prime rib rare, as ordered, but reported that it had a strange, unpleasant flavor. Because of its uniform color and overall appearance, we inquired whether it had been cooked in a microwave oven. It had not been, we were told.

"We did not linger afterwards. We paid the $16.77 tab and hurried home to pop one of Mrs. Smith's frozen blueberry pies in the oven for dessert."

3. It is an established principle of law as enunciated in **Gertz v. Welch,** 418 U. S. 323 at pages 339 and 340:

"Under the First Amendment **there is no such thing as a false idea.** However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries but on the competition of other ideas."

4. Here the reporters who visited the restaurant merely expressed their opinion of the food and service and restaurant. On pages 10, 11, 12, 15, 16, 19, 21, 22, 40, 41, and 49 of the deposition of George R. Ihle, President of the corporate Plaintiff, taken September 6, 1979, he conceded that the reporter expressed "his opinion."

5. Mrs. Ida Ihle, Secretary-Treasurer of the corporate Plaintiff, at her deposition taken the same day, at pages 3, 4, and 7 agreed that the reporter expressed "his opinion."

6. In Mr. Ihle's deposition he said that he advertised to get public patronage, at page 10, and Mrs. Ihle said the same thing at pages 4 and 7 of her deposition. Mrs. Ihle further said that she was interested in the opinions of newspaper reporters (page 5), that she would like to have a reporter come to the restaurant and express his opinion (page 6), and that the purpose of advertising was to get people to come to the restaurant and try it (pages 6 and 7). Introduced into evidence at the depositions were numerous advertisements run by Plaintiff including such language as "Aw, what an array of delectability," "Eat, drink and be merry," and several times "Here's a meal you can't refuse."

7. In **Mashburn v. Collin** (1977), 355 So. 2d 879, 3 Med. L. Rptr. 1673, the Supreme Court of Louisiana reversed the court of appeal and upheld the trial court in granting summary judgment for the Defendant.

In **Mashburn,** as here, a newspaper columnist wrote a column about the food served by a public restaurant, in which he said:

"T'aint Creole, t'aint Cajun, t'aint French, t'aint Country American, t'aint good .... hideous sauces .... travesty of pretentious amateurism .... ghastly concoction .... Gave a bad taste in one's mouth .... like bad overcooked broiled fish .... yellow death on duck .... The restaurant as it stands now is a burlesque."

The Court concluded (3 Med. L. Rptr. at 1680 and 1681):

"It is undisputed that the Maison de Mashburn is a public restaurant, actively engaged in advertising and seeking commercial patronage. Thus the establishment was a matter of public interest and properly a subject of fair comment under the common law and the constitutional privilege. We think it equally clear that Collin, as a writer of a regular newspaper column, qualifies as a member of the press or the news media, regardless of how ill-defined that term may be or whether the New York Times - Gertz privilege is to be restricted to such persons. Therefore, since we have also concluded that the writings complained of were expressions of opinion rather than statements of fact, they were priviledged unless published with knowing or reckless falsity. It is upon this last issue that plaintiff has concentrated his effort to defeat finally the motion for a summary judgment filed by the defendant.

"A motion for summary judgment should be granted where it is shown that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law.

"Accordingly, we conclude that the trial judge was correct in granting summary judgment for the defendant in this case. There is no genuine dispute as to a material issue of fact and upon the facts before the Court the mover is entitled to judgment."

8. This is the same principle of law followed in Florida. See **Early v. Palm Beach Newspapers** (Fla. D.C.A. 4, 1976), 334 So.2d 50, appeal dismissed and certiorari denied (Fla. 1977) 354 So. 2d 351, 3 Med. L. Rptr. 2183, certiorari denied, — U.S. — (10-16-78). In **Early** the newspaper defendants published several hundred news articles, editorials and cartoons where they frankly stated that plaintiff was "unfit to hold the office Superintendent of Public Instruction because of his **ineptness, incompetence** and indecisiveness". A million dollars was awarded plaintiff but the Court of Appeal reversed and ordered judgment for the defendants. The Court said at pages 51, 53, and 54:

"Both papers, through their respective editorial and news staffs, embarked upon a **concerted campaign admittedly designed to bring about the removal of Mr. Early** from his elected position. In pursuance of this objective, the defendants published over a period of approximately fourteen months

several hundred news articles and editorials, all of which were generally hostile to or critical of Early and many of which were of a defamatory nature.

"There was, at the most, only proof of defendants' failure to investigate, which without more, cannot establish reckless disregard for the truth. Gertz v. Robert Welch, Inc., supra, at 332, 94 S. Ct. 2997.

"Most of the articles and cartoons would fall in the category of what the courts have chosen to call '**rhetorical hyperbole**' or 'the conventional give and take in our economic and political controversies.' In this category were statements to the effect that public confidence in the school system was eroding, that the public was clamoring for new leadership in the school system, that plaintiff enjoyed TV and news exposure, that plaintiff had not, prior to his election, held an administrative position in the school system higher than acting principal, and such cartoons as depicted the school buildings falling down or crumbling under plaintiff's leadership, as typical examples.

"We do not here attempt to discuss or classify more than a smattering of the **several hundred derogatory articles** and cartoons which defendants published of and conconcering plaintiff. Suffice it to say that **while most of the articles and cartoons can fairly be described as slanted, mean, vicious, and substantially below the level of objectivity that one would expect of responsible journalism, there is no evidence called to our attention which clearly and convincingly demonstrates that a single one of the articles was a false statement of fact made with actual malice as defined in the New York Times case.** We thus conclude that the defendants' motion for a directed verdict at the close of the evidence should have been granted by the trial court. The judgment is therefore reversed and the cause remanded with directions to enter a judgment in favor of the defendants."

9. See also **Craig v. Moore and WAPE** (C.C. Duval, 1978), 48 Fla. Supp. 29, 4 Med. L. Rptr. 1402; and **Steaks Unlimited v. Deaner,** *U.S.D.C. Pa., April, 1979) 4 Med. L. Rptr. 2569.

In **Craig v. Moore,** Plaintiff Mayor of Jacksonville Beach complained because the Radio Station had said that he "quite often misleads if not blatantly lies ..." The Court followed **Gertz** and held

that the Radio Station was entitled to have and express its opinion and entered up Summary Judgment for the Defendant. In **Steaks Unlimited v. Deaner** the Court again upheld the right of the media to express its opinion of the Plaintiff's meat particularly since the Plaintiff, through its widespread advertising, voluntarily exposed itself to public comment and criticism. The Court followed **Gertz** and entered up Summary Judgment for the Defendant notwithstanding the criticism by the Defendant of the Plaintiff's meat including such language as "had a feeling something was wrong --- a tip-off that something is being hidden --- totally deceptive and misleading --- total misrepresentation --- another mis-representation --- deceptive sales tactics."

10. The article sued on by **Plaintiff** here is clearly an expression of opinion on an establishment of public interest, a restaurant "actively engaged in advertising and seeking commercial patronage." See page 10 of Ihle deposition and pages 4 - 7 of Mrs. Ihle's deposition. We quote from page 7: "Mr. Wahl, I wanted everybody to come. I wasn't ashamed of our restaurant --- wanted the whole world to come to our restaurant and see what they found and express their opinion --- and express their opinions to their friends."

11. There is no showing which would justify punitive damages, even if a cause of action had been alleged for compensatory damages. See **Gertz v. Welch,** (1974) 418 U. S. 323; **Flagler Museum v. Lee,** (Fla. D.C.A. 4, 1972) 268 So. 2d 434; **Florida Power v. Scudder,** (Fla. D.C.A. 2, 1977) 350 So. 2d 106, hn. 12; **Carter v. Lake Wales Assn.,** (Fla. D.C.A. 2, 1968) 213 So. 2d 898; **Moore v. Southern Bell,** (Fla. D.C.A. 2, 1965) 176 So. 2d 558; **Thompson v. City,** (Fla. D.C.A. 1, 1961) 130 So. 2d 105; **Ross v. Gore,** (Fla. 1950) 48 So. 2d 412.

12. While Plaintiff in Count III alleges that there was a contract between the parties under which "the Defendant would use its newspaper to publish and promote the best interest and welfare of the Plaintiffs' business", the officers of the Plaintiff conceded at their deposition that the advertising contracts in question, attached as Exhibit 1 to the deposition, are the ones sued on and that these are "plain simple advertising contracts" (page 7), and which did not "purport to give Plaintiff any control over or access to news and editorial columns" (page 48), that the contract provided on its face "this agreement shall cover only advertising" (page 48). The affidavit of R. G. Schultz, Sr. supports this, and there is nothing to the contrary.

13. President Ihle conceded that anybody has a right to have

an opinion, but contended that a newspaper did not. This is squarely opposed to and is overruled by **Gertz v. Welch, supra.**

14. Plaintiff in Count II complained under F.S. 836.03, which makes it a criminal offense to publish an anonymous publication in which "any person is attacked in his good name or it is attempted to bring disgrace or ridicule upon him."

In the first place, this is a criminal statute and not a civil one. Next, there is nothing more here than an expression of opinion based on stated facts. More importantly, it cannot be construed to contravene the express holding of the United States Supreme Court in **Gertz, supra,** that any person has the right to express his opinion. Cf. **Miami Herald v. Tornillo** (1974), 418 U.S. 241.

Construing the case here most strongly against Defendant there is no basis on which a jury could find actionable libel. What we have here is an expression of opinion about a business which advertised to the public, solicited the business of the public, and solicited the opinion of the public on the business. Plaintiffs have repeatedly conceded in their depositions that what the newspaper here did was to publish an opinion on the business and service of the Plaintiffs, clearly authorized by **Gertz v. Welch** and the other cases cited supra.

The decisions of the United States Supreme Court and the Florida courts make it clear that summary judgment is the remedy in a situation of this kind.

It is ordered that the Plaintiffs George R. Ihle, Ida M. Ihle, and New South Enterprisers, Inc. each take nothing by this suit; that the Defendant Florida Publishing Company go hence without day; and that the Defendant have and recover its costs from the Plaintiffs, such costs to be hereafter taxed by the Court.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 30th day of October, 1979.

/s/ HENRY LEE ADAMS, JR.
CIRCUIT JUDGE

Copies to:

Albert S. C. Millar, Jr., Esquire
Attorney for Plaintiffs
1239 King Street
Jacksonville, Florida 32204

Harold B. Wahl, Esquire
Wahl and Gabel
Attorneys for Defendant
Suite 405, Florida Title Bldg.
Jacksonville, Florida 32202

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

GEORGE R. IHLE, IDA M. IHLE, his wife, and NEW SOUTH ENTERPRISES, INC.,

Appellants,

vs.

FLORIDA PUBLISHING COMPANY,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

CASE NO. TT-333

Opinion filed October 15, 1980.

An appeal from the Circuit Court for Duval County.
Henry Lee Adams, Jr., Judge.

Al Millar, Jacksonville, for Appellants.

Harold B. Wahl, of Wahl and Gabel, Jacksonville, for Appellee

PER CURIAM.

AFFIRMED.

MILLS, Chief Judge, McCORD and THOMPSON, JJ., CONCUR.

IN THE SUPREME COURT OF FLORIDA
MONDAY, NOVEMBER 17, 1980

GEORGE R. IHLE, IDA M. IHLE, his wife, and NEW SOUTH ENTERPRISES, INC.,

Petitioners,

vs.

FLORIDA PUBLISHING COMPANY,

Respondent.

CASE NO. 59,920

District Court of Appeal, First District - No. TT-323

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. **Jenkins v. State,** 385 So. 2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: /s/ Debbie Causseaux
Deputy Clerk

C

cc: Hon. Raymond E. Rhodes, Clerk
Hon. S. Morgan Slaughter, Clerk
Hon. Henry Lee Adams, Jr., Judge

Al Millar, Esquire
Harold B. Wahl, Esquire

"836.03 — Owner or editor of the paper also guilty

Any owner, manager, publisher or editor of any newspaper or other publication who permits any anonymous communication or communications such as is signed otherwise than with the true name of the writer, and such name published therewith to appear in the columns of his publication in which said communication any person is attacked in his good name, or it is attempted to bring disgrace or ridicule upon any person, such owner, manager, publisher or editor shall be guilty of a misdemeanor of the first degree, punishable as provided in SS 775.082 or SS 775.083."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Harold B. Wahl, Esquire, Suite 405, Florida Title Building, Jacksonville, Florida 32202, by mail this 17th day of February, A.D. 1981.

/s/ Al Millar
Attorney

No. 80-1412

In the Supreme Court of the United States

October Term, 1980

GEORGE R. IHLE, IDA M. IHLE,
his wife, and NEW SOUTH
ENTERPRISES, INC.,
Petitioners,

vs.

FLORIDA PUBLISHING COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
FLORIDA DISTRICT COURT OF APPEAL
FIRST DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

HAROLD B. WAHL
(Counsel of Record)
WAHL AND GABEL
405 Florida Title Building
Jacksonville, Florida 32202
Telephone: (904) 353-7329
Attorneys for Respondent

JOHN F. GAILLARD
P.O. Box 1949-F
Jacksonville, Florida 32231
(904) 359-4111

GEORGE D. GABEL, JR.
405 Florida Title Building
Jacksonville, Florida 32202
(904) 353-7166
Of Counsel

MARCH, 1981

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

It is difficult to understand from the Petition the question Petitioners seek to have reviewed here. We suggest the question might be stated as follows:

> When a newspaper publishes a food review on a public restaurant, which restaurant admittedly is seeking public patronage and the opinion of the public on its food and service, is the newspaper liable for stating its honest *opinion* of such food and service based on stated facts?

The Courts below held:

> "Construing the case here most strongly against Defendant there is no basis on which a jury could find actionable libel. What we have here is an expression of opinion about a business which advertised to the public, solicited the business of the public, and solicited the opinion of the public on the business. Plaintiffs have repeatedly conceded in their depositions that what the newspaper here did was to publish an opinion on the business and service of the Plaintiffs, clearly authorized by *Gertz v. Welch* and the other cases cited supra." (Petition A6).

PARTIES TO PROCEEDING

All parties to the proceeding are listed in the Caption.

TABLE OF CONTENTS

Questions Presented for Review I
Parties to Proceeding I
Concise Statement of Case 1
Reasons Why Writ Should Not Be Allowed 5
Recent Cases 7
Conclusion 9

Table of Authorities

Anton v. St. Louis Newspaper (Mo.App. 1980), 5 Med. L.Rptr. 2601 7
Belton v. Braham (N.Y. Supreme Court No. 2623/80-8/5/80), 6 Med.L.Rptr. 1787 8
Block v. Desert Sun (Calif. C.A., April 15, 1980), 6 Med.L.Rptr. 1368 8
Bon Air v. Time (U.S.C.A. 5-1970), 426 F.2d 858 8
Bortel v. Citizens for Better Care (Mich. Court of Appeals-7/3/80), 6 Med.L.Rptr. 1797 8
John L. Brewer v. Memphis Publishing Co. (C.A. 5-No. 77-2254, 10/2/80), 626 F.2d 1238 8
Burns v. Denver Post (Col.App. 1979), 5 Med.L.Rptr. 2004, 606 P.2d 1310 8
Burns v. Denver Post (Col.App. 1980), 6 Med.L.Rptr. 2415 8
Coleman, et al. v. Collins (Fla. D.C.A. 5-June 30, 1980), 384 So.2d 229 8
Craig v. Moore (C.C. Duval 1978), 48 Fla.Supp. 29, 4 Med.L.Rptr. 1402 5
Damron v. Ocala Star-Banner (Fla. D.C.A. 1-1962), 263 So.2d 291 8

PREVIOUS PAGE WAS BLANK

Desert Sun v. California Superior Court (Calif. Court of Appeals 1979), 5 Med.L.Rptr. 1881 7

Dupler v. Mansfield Journal (Ohio Court of Appeals 1979), 5 Med.L.Rptr. 2269, 2274 7

Early v. Palm Beach Newspapers (Fla. D.C.A. 4-1976), 334 So.2d 50; appeal dismissed and cert. den. (Fla. 1977), 354 So.2d 351, 3 Med.L.Rptr. 2183, cert. den., 439 U.S. 910 (10-16-78) 5

Fitzgerald v. Minnesota Chiropractic Association (Minn. S.Ct., April 4, 1980), 6 Med.L.Rptr. 1392 8

Gertz v. Welch, 418 U.S. 323 at 339 and 340 .....3, 5, 6, 7, 8, 9

Holy Spirit Association v. Sequoia Elsevier (Appellate Division, N.Y. Supreme Court, April 11, 1980), 6 Med.L.Rptr. 1191, 1192 8

Loeb v. Globe Newspaper (U.S.D.C. Mass. February 1, 1980), 6 Med.L.Rptr. 1235 8

Long v. Arcell (U.S.C.A. 5-June 13, 1980), 618 F.2d 1145 8

McIntyre v. Westinghouse (U.S.D.C. Mass. 1979), 479 F.Supp. 808, 5 Med.L.Rptr. 2459 7

Mashburn v. Collin (La. S.Ct. 1977), 355 So.2d 879, 3 Med.L.Rptr. 1673 5

Miami Herald v. Tornillo (1974), 418 U.S. 241 6

Myers v. Boston Magazine (Mass. Supreme Judicial Court), 6 Med.L.Rptr. 1241 8

Naked City v. Chicago Sun Times (Ill.App. 1979), 5 Med.L.Rptr. 1806 7

National Association v. Central Broadcasting (Mass. Supreme Judicial Court 1979), 5 Med.L.Rptr. 2078 7

Ocala Star-Banner v. Damron (1971), 401 U.S. 295 8

Ollman v. Evans (U.S.D.C. 1979), 5 Med.L.Rptr. 1809 7

Steaks Unlimited v. Deaner (U.S.D.C. Pa. 1979), 4 Med.L.Rptr. 2569, aff'd U.S.C.A. 3-4/24/80, 623 F.2d 264, 6 Med.L.Rptr. 1129 5

Stripling v. Literary Guild (U.S.D.C. M.D. Tex. 1979), 5 Med.L.Rptr. 1958 7
Traube v. Arnold (N.Y. 1979), 5 Med.L.Rptr. 2143 7
Washington Post v. Keogh (U.S.C.A. D.C. 1966), 365 F.2d 965 at 968 8
Yiamouyiannis v. Consumers Union (U.S.C.A. 2-1980), 619 F.2d 932 8
Libel, Slander and Related Problems (Robert D. Sack - Practicing Law Institute-1980), p. 154 8
Section 566, Restatement of Law of Torts - 2d Edition 7

No. 80-1412

In the Supreme Court of the United States

October Term, 1980

GEORGE R. IHLE, IDA M. IHLE,
his wife, and NEW SOUTH
ENTERPRISES, INC.,
Petitioners,

vs.

FLORIDA PUBLISHING COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
FLORIDA DISTRICT COURT OF APPEAL
FIRST DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

CONCISE STATEMENT OF THE CASE

Petitioners, GEORGE R. IHLE, IDA M. IHLE, and NEW SOUTH ENTERPRISES, INC., do not say to what court below their Petition is addressed,[1] nor do they ask for any particular relief. Nor is their Petition signed.

1. Presumably they desire the writ directed to the Florida District Court of Appeal, First District, and accordingly we so show on our cover.

However, they attach a copy of the summary judgment entered by the Circuit Court of Duval County, Florida (Henry L. Adams, Jr., J) on October 30, 1979 (50 Fla. Supp. ....., 5 Med.L.Rptr. 2005), a copy of the per curiam affirmance thereof by the Florida District Court of Appeal, First District, on October 15, 1980 (..... So.2d ....., 6 Med.L.Rptr. 2081), and a copy of the order of the Supreme Court of Florida dismissing the petition for review, entered November 17, 1980 (..... So.2d ....., 6 Med.L.Rptr. 2298).

Petitioners do not file any kind of a record except the court orders shown above. The appellate decisions are per curiam without opinions, but the summary judgment entered for the defendant by the trial court shows the facts.

We quote paragraphs 1-6 and 10 from the summary judgment for the defendant (Petition A1, A2, A5):

> "1. Plaintiffs sue because the Defendant newspaper on April 26, 1976, ran an article or review of Plaintiffs' restaurant entitled 'It Wasn't a Fancy Meal.'
>
> "2. The article had some favorable comments, but the most unfavorable comments were:
>
> > 'Our food was served. My steak, listed as 10 ounces seemed small. It appeared to have been cooked in a blast furnace, which may have accounted for its scrawny look.
> >
> > 'My spouse found the prime rib rare, as ordered, but reported that it had a strange, unpleasant flavor. Because of its uniform color and overall appearance, we inquired whether it had been cooked in a microwave oven. It had not been, we were told.
> >
> > 'We did not linger afterwards. We paid the $16.77 tab and hurried home to pop one of Mrs.

Smith's frozen blueberry pies in the oven for dessert.'

"3. It is an established principle of law as enunciated in *Gertz v. Welch,* 418 U.S. 323 at pages 339 and 340:

> 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries but on the competition of other ideas.'

"4. Here the reporters who visited the restaurant merely expressed their opinion of the food and service and restaurant. On pages 10, 11, 12, 15, 16, 19, 21, 22, 41, and 49 of the deposition of George R. Ihle, President of the corporate Plaintiff, taken September 6, 1979, he conceded that the reporter expressed 'his opinion.'

"5. Mrs. Ida Ihle, Secretary-Treasurer of the corporate Plaintiff, at her deposition taken the same day, at pages 3, 4, and 7 agreed that the reporter expressed 'his opinion.'

"6. In Mr. Ihle's deposition he said that he advertised to get public patronage, at page 10, and Mrs. Ihle said the same thing at pages 4 and 7 of her deposition. Mrs. Ihle further said that she was interested in the opinions of newspaper reporters (page 5), that she would like to have a reporter come to the restaurant and express his opinion (page 6), and that the purpose of advertising was to get people to come to the restaurant and try it (pages 6 and 7). Introduced into evidence at the depositions were numerous advertisements run by Plaintiff including such language as 'Aw, what an array of delectability,' 'Eat,

drink and be merry,' and several times 'Here's a meal you can't refuse.'

"10. The article sued on by Plaintiff here is clearly an expression of opinion on an establishment of public interest, a restaurant 'actively engaged in advertising and seeking commercial patronage.' See page 10 of Ihle deposition and pages 4-7 of Mrs. Ihle's deposition. We quote from page 7: 'Mr. Wahl, I wanted everybody to come. I wasn't ashamed of our restaurant—wanted the whole world to come to our restaurant and see what they found and express their opinion—and express their opinions to their friends.' "

Plaintiffs were not only given the name of the reporter who wrote the review, but attached to defendant's motion for summary judgment was the affidavit of the reporter Lloyd Brown. We quote from that affidavit:

"BEFORE THE SUBSCRIBER personally appeared Lloyd Brown, who, being first duly sworn, deposes and says:

"I am a member of the editorial staff of the Jacksonville Journal and have been with the Journal for 22 years.

"I wrote the article about the New South Restaurant which appeared in the Jacksonville Journal on or about August 22, 1976, and which is the subject of this suit, George R. Ihle, Ida M. Ihle, his wife, and New South Enterprises, Inc., Plaintiffs, vs. Florida Publishing Company, Defendant.

"It is customary for the Journal to have articles written on restaurants and eating places and to use the name Jean Romain for such reviews. They were written by a number of different reporters.

"I have again reviewed my article and repeat that it was my honest opinion of the food and service I found at that restaurant.

"I do not know Mr. or Mrs. Ihle personally and have no feeling one way or another toward them. My wife and I simply had dinner at their restaurant, for which we paid the published price, and I wrote a review giving my honest opinion of the restaurant and its food and service."

Plaintiffs chose not to answer that affidavit nor to take Brown's deposition. The affidavit was served over a month prior to the hearing on motion for summary judgment.

REASONS WHY WRIT SHOULD NOT BE ALLOWED

Here there is a clear expression of honest opinion, based on stated facts, on the food and service of a restaurant which advertised for, and sought, the opinion of the public (as frankly conceded over and over again by plaintiffs).

Under *Gertz*, the other cases cited by the trial court,[2] and those cited in footnote 3 hereto, there is no cause of action here for libel (or, for that matter, for anything else).

Plaintiffs apparently try to state a cause of action because the newspaper had a policy of publishing its food reviews under the name of Jean Romain. Obviously if

---

2. See particularly *Mashburn v. Collin* (La. S.Ct. 1977), 355 So.2d 879, 3 Med.L.Rptr. 1673; *Craig v. Moore* (C.C. Duval 1978), 48 Fla.Supp. 29, 4 Med.L.Rptr. 1402; *Steaks Unlimited v. Deaner* (U.S.D.C. Pa. 1979), 4 Med.L.Rptr. 2569, aff'd U.S.C.A. 3-4/24/80, 623 F.2d 264, 6 Med.L.Rptr. 1129; and *Early v. Palm Beach Newspapers* (Fla. D.C.A. 4-1976), 334 So.2d 50, appeal dismissed and certiorari denied (Fla. 1977), 354 So.2d 351, 3 Med.L.Rptr. 2183; certiorari denied, 439 U.S. 910 (10-16-78).

the restaurants know that the customer is Jean Romain, a newspaper critic, at the time they serve him, he can not get the ordinary regular brand of service on which to comment.

But long before the hearing the plaintiffs not only had the name, identity and address of the critic, but a full affidavit from him. They chose not to depose him.

It is significant plaintiffs cite not a single case in support of their position.

The trial court found in paragraph 14 of the summary judgment (A6):

> "Plaintiff in Count II complained under F.S. 836.03, which makes it a criminal offense to publish an anonymous publication in which 'any person is attacked in his good name or it is attempted to bring disgrace or ridicule upon him.'
>
> "In the first place, this is a criminal statute and not a civil one. Next, there is nothing more here than an expression of opinion based on stated facts. More importantly it cannot be construed to contravene the express holding of the United States Supreme Court in *Gertz, supra,* that any person has the right to express his opinion. Cf. *Miami Herald v. Tornillo* (1974), 418 U.S. 241."

The statute relied on by plaintiffs simply has no application here under the facts, as shown by the findings above quoted.

Plaintiffs never made any attempt to sue the reporter-critic, even when they had his identity, but sued only his employer, the newspaper, which accepted full responsibility for the article. All conceded the article was an expression of opinion.

RECENT CASES

Following *Gertz*, the law is summarized in the black faced Section 566 - Restatement of the Law of Torts, Second Edition - as follows:

"§566. Expressions of Opinion

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."

Recent cases (published since the date of the summary judgment here) upholding judgment for defendant on expressions of opinion are cited in footnote hereto.[3]

---

3. *Naked City v. Chicago Sun Times* (Ill.App. 1979), 5 Med.L.Rptr. 1806, on editorial opinion that pageant amounted to "pornography"; *Ollman v. Evans* (U.S.D.C. D.C. 1979), 5 Med.L. Rptr. 1809, on syndicated columnist's expressed opinion that professor was "political Marxist" and denigrating his reputation as a scholar; *Stripling v. Literary Guild* (U.S.D.C. M.D. Tex. 1979), 5 Med.L.Rptr. 1958, on published opinion that plaintiff was a "scoundrel"; *McIntyre v. Westinghouse* (U.S.D.C. Mass. 1979), 479 F.Supp. 808, 5 Med.L.Rptr. 2459, on editorial opinion that activities of minister were "sowing seeds of distrust" between United States and Russia; *Dupler v. Mansfield Journal* (Ohio Court of Appeals 1979), 5 Med.L.Rptr. 2269, 2274, reversing lower court and ordering judgment for publisher on expression of opinion that candidate had violated Ohio laws as a private investigator; *Anton v. St. Louis Newspaper* (Mo.App. 1980), 5 Med.L.Rptr. 2601, upholding dismissal of libel suit on basis libelous per se statement was expression of opinion about non public figure attorney for which no cause of action would lie; *Traube v. Arnold* (N.Y. 1979), 5 Med.L.Rptr. 2143, dismissing libel suit of "enthusiastic small time agent" and upholding use of "rhetorical hyperbole or epithets" in opinion; *National Association v. Central Broadcasting* (Mass. Supreme Judicial Court 1979), 5 Med.L.Rptr. 2078, reversing lower court and ordering summary judgment for radio station on expressing opinion that unionization sought was "inroads of communism", citing *Gertz; Desert Sun v. California Superior Court* (Calif. Court of Appeals 1979), 5 Med.L.Rptr. 1881, where appellate court reversed trial court and directed entry of summary

(Continued on following page)

Footnote continued—

judgment for publisher expressing an opinion that plaintiff was guilty of "political chicanery"; *Burns v. Denver Post* (Col.App. 1979), 5 Med.L.Rptr. 2004, 606 P.2d 1310, where summary judgment for newspaper was upheld on appeal when it published what court construed to be husband's opinion of why libel plaintiff wife divorced him; *Holy Spirit Association v. Sequoia Elsevier* (Appellate Division, New York Supreme Court, April 11, 1980), 6 Med.L.Rptr. 1191, 1192; *Loeb v. Globe Newspaper* (U.S.D.C. Mass. February 1, 1980), 6 Med.L.Rptr. 1235; *Myers v. Boston Magazine* (Mass. Supreme Judicial Court), 6 Med.L.Rptr. 1241; *Long v. Arcell* (U.S.C.A. 5-June 13, 1980), 618 F.2d 1145; *Block v. Desert Sun* (Calif. C.A., April 15, 1980), 6 Med.L.Rptr. 1368; *Fitzgerald v. Minnesota Chiropractic Association,* (Minn. S.Ct., April 4, 1980), 6 Med.L.Rptr. 1392; *Yiamouyiannis v. Consumers Union* (U.S.C.A. 2-1980), 619 F.2d 932; *Coleman, et al. v. Collins* (Fla. D.C.A. 5-June 30, 1980), 384 So.2d 229; *Belton v. Braham* (N.Y. Supreme Court No. 2623/80-8/5/80), 6 Med.L.Rptr. 1787; *Bortel v. Citizens for Better Care* (Mich. Court of Appeals-7/3/80), 6 Med.L.Rptr. 1797; *John L. Brewer v. Memphis Publishing Co.* (C.A. 5-No. 77-2254, 10/2/80), reported at 626 F.2d 1238, where the Fifth Circuit reversed the trial court and ordered judgment entered for the newspaper defendant even though the publication was not accurate or correct, and *Burns v. Denver Post* (Col.App. 1980), 6 Med.L.Rptr. 2415, reversing the lower court and holding that statement that family had "deserted" plaintiff was a constitutionally protected statement of opinion, citing among others the first *Burns* case at 606 P.2d 1310.

The Florida court has on numerous occasions affirmed summary judgment for the publisher in libel and privacy actions. See *Damron v. Ocala Star-Banner* (Fla. D.C.A. 1-1962), 263 So.2d 291 - summary judgment was there entered after remand from United States Supreme Court reversing judgment for plaintiff - *Ocala Star-Banner v. Damron* (1971), 401 U.S. 295. Two of the best explanations for the necessity for summary judgment in First Amendment cases are found in *Washington Post v. Keogh* (U.S.C.A. D.C. 1966), 365 F.2d 965 at 968, and *Bon Air v. Time* (U.S.C.A. 5-1970), 426 F.2d 858.

In *Libel, Slander and Related Problems* (Robert D. Sack - Practicing Law Institute-1980), p. 154, it is held:

> In *Gertz* "the Court asserted that as a matter of constitutional law there can be no such thing as a false idea or opinion. This principle, together with the implication in *Gertz* that only a falsehood can be defamatory, seems to lead inexorably to a powerful syllogism: A defamation is actionable only if it is false; opinions cannot be false; therefore opinions can never be actionable even if defamatory."

CONCLUSION

It is clear that (1) the petition fails to meet the rules or show any basis for certiorari and (2) under *Gertz* and its progeny plaintiffs have no cause of action for an honest opinion upon stated facts.

HAROLD B. WAHL
(Counsel of Record)
WAHL AND GABEL
405 Florida Title Building
Jacksonville, Florida 32202
Telephone: (904) 353-7329
Attorneys for Respondent

JOHN F. GAILLARD
P.O. Box 1949-F
Jacksonville, Florida 32231
(904) 359-4111

GEORGE D. GABEL, JR.
405 Florida Title Building
Jacksonville, Florida 32202
(904) 353-7166
Of Counsel

MARCH, 1981